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No. 10-454

In The
Supreme Court of the United States

ARIZONA CATTLE GROWERS' ASSOCIATION,

Petitioner,

vs.

SALAZAR, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO OPPOSITIONS TO PETITION FOR WRIT OF CERTIORARI

NORMAN D. JAMES
Counsel of Record
FENNEMORE CRAIG, P.C.
3003 North Central Avenue
Suite 2600
Phoenix, AZ 85012-2913
(602) 916-5346
njames@fclaw.com

THOMAS J. WARD
NATIONAL ASSOCIATION OF HOME BUILDERS
1201 15th Street, NW
Washington, D.C. 20005-2800
(202) 266-8200

Counsel for Petitioner Arizona Cattle Growers' Association

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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I. INTRODUCTION.

Petitioner Arizona Cattle Growers' Association submits this reply in support of its petition for a writ of certiorari to review the opinion and judgment of the Ninth Circuit, which is reproduced at App. 1-34 and reported at 606 F.3d 1160. For the reasons set forth below, the arguments of the Secretary of the Interior, *et al.* ("the Secretary"), and intervenor Center for Biological Diversity ("CBD") lack merit. Both opposition briefs portray this case as a run-of-the-mill challenge to an agency action that turns on factual disagreements. Because of the lower courts' erroneous interpretation of the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*, however, this case presents a clear split with the Tenth Circuit Court of Appeals and Supreme Court precedent.

Congress amended the ESA to define critical habitat and impose deadlines and requirements for its designation, in response to this Court's opinion in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), and the overbroad definition of critical habitat promulgated by the Fish and Wildlife Service ("FWS"), which included areas for future population expansion. *See Interagency Cooperation Regulations; Final Rule*, 43 Fed. Reg. 870, 874-75 (Jan. 4, 1978). In defining critical habitat, Congress deliberately distinguished between areas that are occupied by a species and unoccupied areas, and allowed the Secretary to designate unoccupied areas as critical habitat only "upon a determination . . . that such areas are essential to the conservation of the species."

16 U.S.C. § 1532(5)(A)(ii); *see also* 50 C.F.R. § 424.12(e). Absent such a designation, "there is no evidence that Congress intended to allow the [FWS] to regulate any parcel of land that is merely capable of supporting a protected species." *Ariz. Cattle Growers' Ass'n v. U.S. Fish and Wildlife Serv.*, 273 F.3d 1229, 1244 (9th Cir. 2001).

Congress also required the Secretary to "designate critical habitat, ... after taking into consideration the economic impact, ... and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2); *see also* 50 C.F.R. § 424.19. Congress added this requirement to ensure that economic impacts and other non-biological factors are taken into account when areas are designated as critical habitat. *See* H.R. Rep. No. 95-1625, at 17 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9467. Consequently, the designation of critical habitat "offers some counter-point to the listing of species without due consideration for the effects on land use and other development interests." H.R. Rep. No. 97-567, at 12 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2811-12.

The Ninth Circuit has undermined these requirements by ignoring the ESA's plain language and the intent of Congress. FWS designated over 8.6 million acres of federal land as critical habitat for the owl – an area equivalent to the State of Rhode Island – while stating that there are between 1,176 and 2,352 known owls on federal land in the southwestern United States. App. 93-94, 238. This means that over

11 square miles of land was designated for *each* owl protected activity center ("PAC"). Instead of relying on scientific evidence of occupancy, FWS declared all of this land "occupied" simply because it lies "within the geographic area occupied by the species," thereby eliminating the requirement to "make a separate determination whether the lands included are essential to the conservation of the owl." App. 135; *compare* 50 C.F.R. § 424.12(e). On appeal, the Ninth Circuit held that the word "occupied" in the definition of critical habitat is ambiguous, and used this purported ambiguity to impermissibly substitute its own expansive view of critical habitat by speculating about unknown owls and the amount of habitat they use.

The Ninth Circuit compounded this judicial overreaching by affirming FWS's use of the "baseline" approach to analyze the economic impacts of the critical habitat, under which impacts related to the species' listing are ignored. The Tenth Circuit has held that the baseline approach is contrary to the plain language and intent of the ESA: "Congress intended that the FWS conduct a full analysis of all of the economic impacts of a critical habitat designation, regardless of whether those impacts are attributable co-extensively to other causes." *N.M. Cattle Growers Ass'n v. U.S. Fish and Wildlife Serv.*, 248 F.3d 1277, 1285 (10th Cir. 2001). The Ninth Circuit ruled that the Tenth Circuit "relied on a faulty premise" based on another Ninth Circuit decision that did *not* address the economic impact analysis required by

ESA § 4(b)(2) or the requirements for designating critical habitat generally. App. 28-30. The Ninth Circuit ignored the language and structure of the ESA, and marginalized consideration of economic impacts.

In short, this case provides this Court with an opportunity to clarify an important component of one of the Nation's most powerful environmental laws, and in the process resolve a festering conflict between the circuits over the role that economic considerations should play under the ESA. The need for this Court's intervention is reflected in the preamble to the owl's 2004 critical habitat rule, in which FWS stated:

> The Service's present system for designating critical habitat has evolved since its original statutory prescription into a process that provides little real conservation benefit, is driven by litigation and the courts rather than biology, limits our ability to fully evaluate the science involved, consumes enormous agency resources, and imposes huge social and economic costs.

App. 84. The fundamental problem with the baseline approach is that it ignores the "huge social and economic costs" resulting from red-lining areas as critical habitat by attributing those costs to the species' listing. These costs are exacerbated when millions of acres of unoccupied land are designated as critical habitat.

II. THE COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE CIRCUITS AND CLARIFY THE ROLE THAT ECONOMIC IMPACTS PLAY IN DESIGNATING CRITICAL HABITAT.

The Secretary and CBD downplay the conflict between the Tenth Circuit's holding in *New Mexico Cattle Growers* and the Ninth Circuit's holding in this case regarding the requirements imposed by ESA § 4(b)(2). Both cases, however, present the same legal issue: Does the baseline approach comply with the plain language and intent of the ESA?

In *New Mexico Cattle Growers*, FWS designated 600 miles of rivers and streams in three states as critical habitat for the southwestern willow flycatcher, but using the baseline approach determined that the designation would not result in additional economic impacts above those attributable to the species' listing. 248 F.3d at 1279-80; *see also* Pet. 21. The Tenth Circuit held that the designation of critical habitat produces serious economic impacts and that *all* of those impacts must be considered, expressly rejecting the baseline approach. 248 F.3d at 1284-85.

The Secretary and CBD contend that the Tenth Circuit's holding was based on the overlapping definitions of "jeopardize the continued existence of" and "destruction or adverse modification" in FWS's § 7 consultation regulations. Opp. 14-17; CBD Br. 6-14. The Tenth Circuit explained, however, that it was interpreting the statute "using traditional tools

of statutory construction," beginning with "the plain language of the law." *N.M. Cattle Growers*, 248 F.3d at 1281 (internal quotation marks and citations omitted). The question it decided was "whether the FWS must analyze all of the economic impacts of critical habitat designation . . . or only those impacts that are a 'but for' result" of the designation. *Id.* at 1284. The court held that "the baseline approach to economic analysis is not in accord with the language and intent *of the ESA*." *Id.* at 1285 (emphasis added). In other words, regardless of the "root of the problem" (*see* Opp. 15; CBD Br. 8), the Tenth Circuit decided *New Mexico Cattle Growers* on the basis of the statute's plain language.

Therefore, the Ninth Circuit's decision in *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004), did not affect the Tenth Circuit's holding in *New Mexico Cattle Growers*. *Gifford Pinchot* did not address the requirements for designating critical habitat, nor did it alter the plain language of ESA § 4(b)(2). CBD speculates that the Tenth Circuit would now approve the baseline approach (CBD Br. 15), but the validity of the regulation defining "destruction or adverse modification" (which remains codified at 50 C.F.R. § 402.02) had nothing to do with the court's holding.

The Secretary and CBD also note that several district courts upheld the baseline approach after *Gifford Pinchot* was decided. Opp. 15; CBD Br. 11-14. Aside from being district court decisions, none of these decisions addresses the import of the statutory

requirement that species' listing and critical habitat designation occur "concurrently." 16 U.S.C. § 1533(a)(3); *see also* 50 C.F.R. §§ 424.12, 424.17(b). If FWS complies with the law, there is no pre-existing regulatory "baseline" that can be used to analyze economic costs, therefore requiring the economic impacts of the species' listing to be analyzed. *Compare* CBD Br. at 16-18 (arguing that the baseline economic costs play no role in listing determinations).

On this point, the Secretary argues that "listing is a necessary antecedent to designation of critical habitat." Opp. 13-14. A species' listing, however, is an "antecedent" action only to the extent that critical habitat cannot be designated for unlisted species. *See* 16 U.S.C. § 1533(a)(3)(A). Absent extraordinary circumstances, both regulatory actions must coincide.

> This legislative history leaves little room for doubt regarding the intent of Congress: The designation of critical habitat is to coincide with the final listing decision absent extraordinary circumstances. Section 4(a)(3) necessarily impresses upon the Secretary . . . an affirmative duty to seek out or, at a minimum, to identify *prior* to the final listing decision the biological and economic data that will be necessary to make his designation of critical habitat.

Northern Spotted Owl v. Lujan, 758 F. Supp. 621, 626 (W.D. Wash. 1991) (emphasis in original).

CBD also argues that because the current iteration of owl's critical habitat was not designated

concurrently with listing but 11 years later, the baseline approach can be used. CBD Br. 18. This argument again conflicts with the statutory scheme established for the designation of critical habitat, and would allow FWS to deviate from that scheme whenever critical habitat is delayed or amended, creating two different standards, one in which all economic costs are considered and one in which few, if any, economic costs are considered.

The Secretary asserts that his "interpretation" of how economic costs should be measured is entitled to deference because the procedures FWS followed in designating critical habitat included public notice and comment. Opp. 12-13. This argument erroneously assumes that there is an "interpretation" to which deference can be given. *See N.M. Cattle Growers*, 248 F.3d at 1281 (holding that the baseline approach is an informal interpretation and not entitled to deference). In this case, the agency took inconsistent positions. FWS stated it would comply with *New Mexico Cattle Growers* in the final rule. App. 161, 165-66. But when FWS performed its analysis of economic impacts, it reversed course without explanation and used the baseline approach. App. 308 ("The economic effects already in place due to the listing of the owl as threatened is the baseline upon which we analyzed the economic effects of the designation."). This muddled rulemaking does not merit any deference.

The Secretary also contends that a 2008 memorandum by the Interior Solicitor in which the scope of the economic analysis was discussed is entitled to deference. Opp. 12-13. This guidance document, which was not issued following public notice and comment or a formal adjudication, is entitled to no weight given its lack of thoroughness and questionable reasoning. *See, e.g., United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). For example, the memorandum fails to address the conflict between the baseline approach and the statutory requirement that critical habitat be designated concurrently with listing, discussed previously. Moreover, because the Tenth Circuit's interpretation of ESA § 4(b)(2) was based on that provision's plain language (*see N.M. Cattle Growers*, 248 F.3d at 1281-82, 1285), there is no room for *post hoc* reinterpretation by the agency. *Nat'l Cable & Tele. Ass'n v. Brand X Internet Services*, 545 U.S. 967, 982-83 (2005).

Finally, the Secretary argues that the fact that critical habitat imposes restrictions on land uses regardless of whether an area is occupied is irrelevant because critical habitat designations can be amended later. Opp. 13. Under this reasoning, all impacts caused by designating critical habitat could be ignored by the agency, rendering § 4(b)(2) meaningless. The point is that FWS cannot lawfully impose habitat management restrictions through the § 7 consultation process in unoccupied areas *unless*

the habitat has been formally designated as critical. *See, e.g., Defenders of Wildlife v. Flowers*, 414 F.3d 1066, 1069-70 (9th Cir. 2005) (ESA § 7 did not apply when no species' members and no critical habitat were found in the project area). And once an area is designated as critical habitat, it remains critical habitat indefinitely, regardless of whether the species' members are present. Consequently, the baseline approach, under which all impacts are attributed to the species' listing, ignores the full impact of critical habitat, as the Tenth Circuit correctly determined.

III. THE COURT SHOULD REVIEW THE NINTH CIRCUIT'S IMPROPER SUBSTITUTION OF ITS OWN RATIONALE FOR DETERMINING THE OCCUPANCY OF THE CRITICAL HABITAT AREAS.

The Secretary and CBD attempt to characterize the Ninth Circuit's holding that all 8.6 million acres of critical habitat were occupied by owls as a fact-bound dispute that was resolved by deference to the agency. Opp. 17-20; CBD Br. 21-26. This characterization is erroneous. A total of 1,176 owl PACs have been identified on federal land. App. 93-94. As the Ninth Circuit stated, these PACs reflect all "*known* owl sites" and contain "the *best* habitat used by owl." App. 18, 20 (emphasis in original). That characterization is consistent with the species' Recovery Plan, which explains that a 600-acre PAC "should provide a reasonable amount of protected

habitat and should provide for the nest site, several roost sites, and the most proximal and highly used foraging areas." App. 402; *see also* App. 88, 218 (a PAC contains 75 percent of an owl's foraging habitat). None of these facts are in dispute.

According to FWS data, the average size of the 987 PACs identified in Arizona and New Mexico National Forests is approximately 650 acres, or about one square mile. App. 423-25. Multiplying the total number of PACs – the areas *known* to be occupied and containing the *best* owl habitat – by the approximate size of an average PAC produces a total of 764,000 acres. Again, these data are not in dispute. This portion of the critical habitat designation meets the test for "occupied." *See, e.g.*, *Designation of Critical Habitat for the Pecos Sunflower*, 73 Fed. Reg. 17762, 17769 (Apr. 1, 2008) ("We consider an area to be currently occupied if [the species] was found to be present by species experts within the last two years. . . . "); *Designation of Critical Habitat for the Guajön*, 72 Fed. Reg. 60068, 60069 (Oct. 23, 2007) (FWS excluded land because "the species was not present at that site, and therefore did not satisfy the statutory definition of occupied critical habitat"); *Listing Gila Chub as Endangered with Critical Habitat*, 70 Fed. Reg. 66664, 66671 (Nov. 2, 2005) (with one exception, "all of the critical habitat areas have been documented as being occupied by [the species] within the last 5 years").

The problem is the remaining 7.8 million acres of land. FWS did *not* find that this land is occupied

based on verifiable records of owls, as it has done in other critical habitat rules, or conclude that owls require millions of additional acres of land for foraging. Instead, FWS simply stated: "Because the specific areas being designated are within the geographical area occupied by the species, we (*i.e.*, the Secretary of Interior) are not required to make a separate determination as to whether the lands included in the designation are essential to the conservation of the owl." App. 135.

The Ninth Circuit did not address the agency's justification, but instead supplied its own, first re-defining the word "occupied," and then asserting that the administrative record actually demonstrated that all 8.6 million acres are occupied under that definition. The court assumed that far greater numbers of owls exist, consisting of unknown birds, non-territorial "floaters" and dispersing juveniles. App. 16-19, 25. It then speculated about how much territory is "regularly used" by owls, applying its newly minted definition of occupied and erroneously referring to the owl as a "migratory" species. App. 20-21, 25.

But the key point is that *the agency* did not conclude that substantial numbers of unknown owls exist and that owls occupy millions of acres of land outside their PACs. *See, e.g.*, App. 93-94, 110 (discussing owl population trends). Instead, the Ninth Circuit did so under its own, expansive definition of "occupied." Consequently, the issue is not whether FWS's determination is entitled to deference, but

whether the Ninth Circuit acted in accordance with established administrative law principles by upholding the agency on grounds not asserted by the agency. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 50 (1983); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962); *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

In short, this is not a highly technical issue requiring deference to an agency's special expertise. Rather, the circuit court improperly upheld a badly flawed rule based on its own interpretation of "occupied" and speculation about the number of unknown owls and what land they actually use. *See Bennett v. Spear*, 520 U.S. 154, 176-77 (1997). It compounded that error by marginalizing the social and economic costs of designating millions of acres of unoccupied land as critical habitat by dismissing *New Mexico Cattle Growers* as precedent and affirming the baseline approach.

Dated: January 17, 2011.

Respectfully submitted,

NORMAN D. JAMES
Counsel of Record
FENNEMORE CRAIG, P.C.

THOMAS J. WARD
NATIONAL ASSOCIATION OF
HOME BUILDERS

Counsel for Petitioner Arizona Cattle Growers' Association